

United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COM-
MISSION OF OREGON, THE OREGON
STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COM-
PANY,

Intervenor.

*Petition for Review to Set Aside Order of the
Federal Power Commission.*

**BRIEF OF THE OREGON DIVISION OF THE
IZAAK WALTON LEAGUE OF AMERICA, INC.,
AMICUS CURIAE**

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1. "Therefore, for the purpose of determining the economic feasibility of the project we find that the total annual cost to applicant of the fish conservation facilities will be \$795,000.00."

2. "* * * that the total annual values attributable to the project will exceed the total annual project costs and losses associated therewith by at least \$351,000. Some additional irrigation diversions may be made in the future at points above the dam site, but until that time the total annual values will exceed costs and losses by about \$450,000."

3. "Furthermore, the serious regional power shortage will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with substantial assistance to other power suppliers."

4. "We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act."

5. "* * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir."

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6. "The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout."

7. "The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote."

8. "After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

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1. "During the five year period 1950-1955, the peak load for the system of Portland General Electric Company will increase by at least 183,000 kilowatts and the energy requirements during the same period will increase by at least 844,300,000 kilowatt-hours, and the load will continue to increase beyond 1955."

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2. "The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed in time."

3. "Other hydroelectric sites available to applicant for development in lieu of the Pelton site are limited, more costly and smaller in productive capacity."

4. "The record fails to show that the Deschutes River system above the Pelton site is capable under natural conditions of producing anadromous fish in substantially greater numbers than are now produced there."

5. "There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant."

6. "The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods."

7. "Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam."

8. "There is no substantial evidence in the record to show that the fishery facilities proposed by the applicant in accordance with the plans prepared by the Fish Commission of Oregon will not maintain existing runs, and there is a possibility that the runs can be increased."

9. "The main reservoir, with elevation 150 feet above the present water elevation, would be more accessible to the public for recreational use, particularly upon completion of a contemplated

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State highway, and will offer recreational opportunities to people from local and distant areas.”

10. “The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.”

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**BRIEF OF THE OREGON DIVISION OF THE
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OPENING STATEMENT

MAY IT PLEASE THE COURT:

This brief amicus curiae is filed pursuant to leave
granted by this Honorable Court, in support of the

petition of The State of Oregon, The Fish Commission of Oregon, The Game Commission of Oregon for review to set aside an order of the Federal Power Commission granting a license (major) to the Portland General Electric Company, Intervenor, to construct, operate and maintain a hydroelectric project on the Deschutes River, an internal, non-navigable river of the State of Oregon, and the right to use, divert and impound the waters of the Deschutes River and its tributaries, all interior, non-navigable rivers of the State of Oregon.

The Petitioners in their brief filed herein have set out a complete and ample statement of the case. In order to avoid duplication and conserve the valuable time of this Honorable Court no further statement of the case will be made in this brief.

The errors of law herein involved are completely set out and argued in the brief of the petitioner and to avoid repetition and duplication and further to lighten the burden on this honorable court amicus curiae hereby adopt the argument of petitioners as to such matters.

**THE FOLLOWING FINDINGS OF FACT MADE
BY THE COMMISSION IN THE OPINION ARE
NOT SUPPORTED BY SUBSTANTIAL
EVIDENCE:**

1. "Therefore, for the purpose of determining the economic feasibility of the project we find that the total annual cost to applicant of the fish conservation facilities will be \$795,000.00.

2. “* * * that the total annual values attributable to the project will exceed the total annual project costs and losses associated therewith by at least \$351,000. Some additional irrigation diversions may be made in the future at points above the dam site, but until that time the total annual values will exceed costs and losses by about \$450,000.”

3. “Furthermore, the serious regional power shortage will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with substantial assistance to other power suppliers.”

4. “We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act.”

5. “* * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir.”

6. “The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout.”

7. “The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote.”

8. "After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

BRIEF OF AUTHORITIES

"Under the Federal Power Act, the Circuit Court of Appeals can review an order of the Federal Power Commission, on the challenge that the Commission's finding of fact on which the order is based is not supported by substantial evidence."

Pacific Power & Light Co., et al. v: Federal Power
Commission, 98 Fed. (2d) 835, 305 U. S. Sup.
Ct. 593.

ARGUMENT

Point I.

There is no substantial evidence in this record to support the finding by the Commission that the annual cost to the applicant of fish conservation facilities would be \$795,000.00. The only evidence in the record concerning such costs that is substantiated by any factual data is from the testimony of Donald R. McKernan (Tr. 777-778, 1003-1007) with the greatest estimate by the witness as to such costs being \$500,000.00. There is testimony on behalf of the applicant of an offer of \$100,000 (Tr. 588) for such expense but this offer is, at no point, substantiated by any factual data to determine how the figure was calculated. It may seem anomalous that we take issue with such finding, since it is greater than the esti-

mates of the experts from the State Fish Commission's staff, but the fact still remains that such finding is not supported by substantial evidence and is subject to review by this Court.)

ARGUMENT

Point II.

This record is utterly devoid of any evidence to support the finding that the values attributable to the project will exceed by \$351,000.00 the costs and lossess associated therewith. The record contains no testimony on this subject whatever. The only evidence touching on this matter being supplied by certain charts and graphs unsubstantiated by the factual data to indicate how the graphs and charts were prepared or on what foundation they rest. Certainly this is not substantial evidence, particularly in view of the fact that the applicant had available to it many engineers and other experts who should have been qualified to testify as to such matters. The Commission itself had four engineers present at the hearing who took part in the proceedings.

ARGUMENT

Point III.

There is no testimony in this record at any point that there is a *serious* regional power shortage. There are some random statements from some lay witnesses that there was a power deficiency in their immediate area but not to the extent that it was regional and that such shortage

may be caused from a lack of adequate transmission facilities considering the distances those witnesses resided from the main transmission lines in the area.

The charts and graphs that are part of the exhibits in this case are not substantiated by any engineering testimony in the record that could and should show how the figures were derived in any way. It seems strange indeed that with so many engineers present and available such testimony is entirely absent from the record.

ARGUMENT

Point IV.

The Army report and the fisheries plan evolved were made after long and intensive study (Tr. 636, 637, 638) and the plans adopted and implemented after meetings in which representatives of the Federal Power Commission took part. While it is true that the Federal Power Commission entered into no signed agreement that it would grant no licenses for construction of power dams on the Deschutes, they certainly either by direct approval or acquiescence confirmed such plans. After the lapse of several years and the expenditure of many thousands of dollars on the part of the other interested bodies in reliance on these plans and such agreements the Federal Power Commission should not now be permitted to deny that those plans, so adopted, are a bar to this license by the process known in the parlance of the streets as "hedging".

ARGUMENT

Point V.

This finding likewise is entirely without evidence to support it. Some of the lay witnesses "expected or thought" that the impoundment "might be better fishing than the river" but they were without any qualification on such matters. The testimony of Charles Campbell, an expert biologist of the Oregon State Game Commission, who was amply qualified to testify on such subjects by both education and experience, gained both generally and in the particular river basin involved, testified that, in his opinion, the recreational and sports fishery would be detrimentally affected (Tr. 699 through 710). No evidence was introduced to show that hydroelectric impoundments in the Northwest, where many exist, afford good sports fishing or even any recreational opportunities.

Recreational opportunities, if any, will be severely curtailed, if not entirely lost, by the tremendous draw down in the impoundment (Tr. 122) which will take place twice each day, to the extent of about six feet each time, since this project will be known as a "peaking plant" (Tr. 122) and operate only at times of heaviest load demand.

The possibility of the State constructing a road into the area is so remote as to be unworthy of consideration. There is no industry or other interests to be served by such road and while the Oregon State Legislature may have ordered a survey, no funds were appropriated for construction, nor has the legislature committed itself to

such an appropriation. In any event, whatever benefits derived from such road, if constructed, would certainly be as readily applicable to the stream in its natural condition as they would be to a lake of 460 acres (Tr. 160) subject to the fluctuations as is the case here.

ARGUMENT

Point VI.

There is no substantial evidence, if any evidence at all, to support this finding. A number of lay witnesses, who were not qualified observers, testified that they had never seen any salmon above the site of the proposed project but none of them, with the exception of F. R. Schanck, testified that there was no salmon or steelhead in the streams. Mr. Schanck, a professional engineer, who has had much to do with engineering surveys on the deschutes and particularly with the Pelton project, was not qualified as a fisheries expert in any manner. His testimony to the effect that there were no salmon in the river prior to the operations of the Oregon Fish Commission, begun in 1937, certainly is not borne out by the testimony of the expert biologists who testified on the same subject (Tr. 464, 761, 783, 812). Mr. Schanck apparently was confused as between the experimental planting of sockeye salmon in 1937 and the start of operations at the Metolius hatchery in 1947 which hatchery was supplied by the eggs taken from a *native* run of spring Chinook salmon (Tr. 812) whose numbers appearing at the trapping racks of the Metolius hatchery averaged 248 fish from 1947 through 1950 (Tr. 846, 847, 848). Obviously, Mr.

Schanck was either a poor observer or he went to extreme lengths to destroy the fishery values of the Deschutes system in an effort to assist the applicant's case. The obvious question that occurs to us at this point is: Why did Mr. Schanck, a qualified engineer with much background and experience in relation to this very project, spend his entire testimony attempting to show that there were no salmon and steelhead in the Deschutes River, a subject on which he was utterly disqualified to testify?

In contradistinction to the testimony of Mr. Schanck the experts called by the State of Oregon from the Oregon State Game Commission and the Oregon Fish Commission, Mr. Charles Campbell (Tr. 689), Mr. Donald L. McKernan (Tr. 768) and Mr. Donald Johnson (Tr. 784) all of whom were qualified biologists and fisheries experts by education and training and further qualified by personal observations and through the work of their respective staff members, testified that salmon and steelhead were produced in the Deschutes River and its tributaries entering the river above the site of the Pelton project, namely the Crooked River, Squaw Creek and the Metolius River.

The Commission apparently failed to distinguish between the fish production of the Deschutes River and the returning adults who were there for reproductive purposes, since it is a well known fact that the reproduction of fish is many times greater than the numbers who survive and return to reproduce their kind. The relation of catch to escapement on Spring Chinook, as established by reputable and competent investigators, is 4.5 to 1. Of summer run steelhead it is 2.2 to 1 (Tr. 783). In the

case of the two above mentioned species of anadromous fish, they produce an average catch in excess of 100,000 pounds of each species by the commercial and sports fishery, based on an average weight of 15 pounds for spring Chinook and 10 pounds for summer run steelhead (Tr. 783) with an average population of 2,500 spring Chinooks and 5,000 summer run steelhead spawning upstream from the site of the Pelton project. One hundred tons of salmon and steelhead taken into the commercial fishery annually from the production of this segment of one river system can not be said to be inconsiderable. Since neither the applicant nor the Federal Power Commission produced a biologist or other competent observer to testify as to the productive capacity of the Deschutes River and its tributaries the testimony of the State's biologists standing alone is conclusive, rendering this finding unsupported by any evidence.

ARGUMENT

Point VII.

The record entirely fails to support the finding that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote. The record conclusively shows that this segment of the Deschutes system produces an estimated annual catch of salmon and steelhead of approximately 100 tons with a spawning population returning for reproduction of 2,500 spring Chinook and 5,000 summer steelhead (Tr. 761) after the catch has been accounted for. The Com-

mission and the trial examiner seem to be confused or they totally lost sight of the evidence as to the catch and took into consideration only the returning spawning populations. There was certainly no competent testimony adduced by either the Commission or the applicant to refute the testimony of the state's witnesses with respect to either the present productivity of the stream or the numbers of fish returning therein to spawn.

The likelihood of the Deschutes becoming a larger producer of fish in the near future was well established by the testimony of Mr. Veatch, Chairman of the Oregon State Fish Commission (Tr. 550) and Mr. Puustinen (Tr. 621). Both of these men have had long experience in fisheries' problems and stream potentials and their testimony was refuted by no one. It is conclusive on this question.

One other very important point to be considered at this time is why did the State of Oregon, in conjunction with the Fish and Wildlife Service of the Department of Interior, undertake the construction in 1947 (Tr. 812), of a large and expensive hatchery for the artificial propagation of the anadromous fish in the Deschutes River system, had there not been every reason, scientific, factual and otherwise, to believe that it would have increased the already sizeable populations using the stream, and would make more fish available to the commercial fishery. This program was commenced several years prior to the time when the application to build this dam had been filed. The record fails to support this finding on the part of the Commission.

ARGUMENT

Point VIII.

Search the record as one may, there is not a single word to support this finding on the part of the Commission. The testimony of the biologists called in behalf of the State of Oregon consistently delineates the losses that the fisheries resources have suffered at other projects similar to the one proposed here (Tr. 670, 679, 680, 699, 700, 701, 702, 709, 710, 779, 780, 781, 816, 819, 821, 830). The expressed opinion of all these biologists was to the effect that the runs of salmon and steelhead could not be maintained by the facilities proposed by the applicant, much less increased. Neither the Commission nor the applicant called any biologist to testify; nor did either of them qualify any witness as a fisheries expert; nor did they offer any evidence of any kind or nature as to the effectiveness of the facilities proposed; apparently relying on the fact that the Oregon State Fish Commission had supplied the plans for the facilities which they were by law required to do (Tr. 775) on request of the applicant. There is no testimony on the part of anyone that the State Fish Commission's plans and specifications, as submitted, would be successful in saving the runs of salmon and steelhead were the dam constructed, or that the facilities would or could offset any of the lost upstream spawning and rearing grounds. The testimony of the engineer, Mr. William R. Farley, a member of the staff of the Federal Power Commission, is extremely significant in this respect, in view of his response to the following question by Staff Counsel:

“Q. Does this investigation involve a consideration of the efficiency and effectiveness of the fish handling facilities proposed by the applicant for the Pelton project?

A. No; but those facilities were considered to the extent that they would affect the annual cost of the project.” (Tr. 615)

Again, at page 617 of the transcript he stated:

“Leaving out the consideration of the effectiveness of the fish handling facilities proposed * * *.”

Why should the studies of this project leave out consideration of these facilities? The question begs the answer: The fisheries resources of the Deschutes system were absolutely disregarded by the Federal Power Commission and the Portland General Electric Company so far as possible and arbitrarily written off with only a token consideration as a mere pretense in considering the interests of the people of the State of Oregon in the destruction of valuable property rights.

**THE FOLLOWING FINDINGS OF FACT MADE
BY THE COMMISSION IN THE ORDER ISSUING
LICENSE ARE NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE:**

1. “During the five year period 1950-1955, the peak load for the system of Portland General Electric Company will increase by at least 183,000 kilowatts and the energy requirements during the same period will increase by at least 844,300,000 kilowatt-hours, and the load will continue to increase beyond 1955.”

2. "The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed on time."

3. "Other hydroelectric sites available to applicant for development in lieu of the Pelton site are limited, more costly and smaller in productive capacity."

4. "The record fails to show that the Deschutes River system above the Pelton site is capable under natural conditions of producing anadromous fish in substantially greater numbers than are now produced there."

5. "There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant."

6. "The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods."

7. "Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam."

8. "There is no substantial evidence in the record to show that the fishery facilities proposed by the applicant in accordance with the plans prepared by the Fish Commission of Oregon will not maintain existing runs, and there is a possibility that the runs can be increased."

9. "The main reservoir, with elevation 150 feet above the present water elevation, would be more accessible to the public for recreational use, particularly upon completion of a contemplated State highway, and will offer

recreational opportunities to people from local and distant areas.”

10. “The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.”

BRIEF OF AUTHORITIES

“Under the Federal Power Act, the Circuit Court of Appeals can review an order of the Federal Power Commission, on the challenge that the Commission’s finding of fact on which the order is based is not supported by substantial evidence.”

Pacific Power & Light Co. et al. v. Federal Power Commission, 98 Fed. (2d) 835, 305 U.S. Sup. Ct. 593.

ARGUMENT

Points I. AND II.

The record contains not a single word of testimony with respect to the increase in the energy requirements of the applicant. The charts and graphs that were submitted and became exhibits in this record are not in any way supported by the testimony of a single witness to show how the computations were made. Such tabulations can be likened to a ship that has been built and fully equipped but is without fuel to propel it. In such condition the ship is utterly useless as are these charts and graphs.

ARGUMENT

Point III.

This record is utterly devoid of any testimony with respect to other sites available to the applicant, their cost or production possibilities. From what source this finding arose it is impossible to determine from this Record. It is a finding that seems to be plucked from thin air and totally unsupported by evidence of any character.

ARGUMENT

Point IV.

The record entirely fails to support the finding that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote. The record conclusively shows that this segment of the Deschutes system produces an estimated annual catch of salmon and steelhead of approximately 100 tons with a spawning population returning for reproduction of 2,500 spring Chinook and 5,000 summer steelhead (Tr. 761) after the catch has been accounted for. The Commission and the trial examiner seem to be confused or they totally lost sight of the evidence as to the catch and took into consideration only the returning spawning populations. There was certainly no competent testimony adduced by either the Commission or the applicant to refute the testimony or the state's witnesses

with respect to either the present productivity of the stream or the numbers of fish returning therein to spawn.

The likelihood of the Deschutes becoming a larger producer of fish in the near future was well established by the testimony of Mr. Veatch, Chairman of the Oregon State Fish Commission (Tr. 550) and Mr. Puustinen (Tr. 621). Both of these men have had long experience in fisheries' problems and stream potentials and their testimony was refuted by no one. It is conclusive on this question.

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ARGUMENT

Point V.

Since neither the Commission nor the applicant brought forward any biologist or other fisheries expert to testify with respect to the fish conservation facilities

proposed by the applicant there is only the testimony of the experts called on behalf of the State of Oregon that has to do with the subject of those facilities. The testimony of Mr. Farley, an engineer on the staff of the Commission, is totally negative in this respect (Tr. 615, 617). While the testimony of the State's witnesses was to the effect that the operation of the facilities as proposed by the applicant was at the very best experimental and very doubtful as to results (Tr. 679, 680, 766).

ARGUMENT

Point VI.

In the first place, the applicant does not at any point propose to operate the fish conservation facilities, nor does the applicant propose to arrange for their operation, that chore being a burden of the State Fish Commission. The applicant only proposes to construct these facilities and has offered only \$100,000.00 (Tr. 588) as its annual contribution to a total cost of operation that is estimated to be in the neighborhood of \$495,000.00 (Tr. 777, 778, 1003, 1007).

The record is replete with testimony on the part of the State that the facilities proposed have never been successful where tried in other places (Tr. 785, 786, 787, 817, 818, 819, 820, 821) and that these facilities are not in accordance with approved methods.

ARGUMENT

Point VII.

It takes relatively little citation or imagination to show the total falacy of this finding. It is obvious from the ample citations hereinbefore set out that it is the opinion of every biologist who testified that the construction of this project will virtually destroy the anadromous fish using the Deschutes River above the point of construction. Obviously those fish spend some of their life in the Deschutes below the point of construction and enter into the total fishery resources of that area below the point of construction. Mr. Campbell in his testimony stated that the young of the steelhead entered the sports fishery as immigrant fish (Tr. 708, 709). It is obvious that destruction of a run of anadromous fish using the entire river as its highway to the headwaters is certainly going to have a detrimental effect on the entire river system not alone on the spawning grounds. There certainly is no testimony in this record to contradict the state's witnesses on the point and none to support the finding, even by inference.

ARGUMENT

Point VIII.

Search the record as one may, there is not a single word to support this finding on the part of the Commission. The testimony of the biologists called in behalf of the State of Oregon consistently delineates the losses that the fisheries resources have suffered at other pro-

jects similar to the one proposed here (Tr. 670, 679, 680, 699, 700, 701, 702, 709, 710, 779, 780, 781, 816, 819, 821, 830). The expressed opinion of all these biologists was to the effect that the runs of salmon and steelhead could not be maintained by the facilities proposed by the applicant, much less increased. Neither the Commission nor the applicant called any biologist to testify; nor did either of them qualify any witness as a fisheries expert; nor did they offer any evidence of any kind or nature as to the effectiveness of the facilities proposed; apparently relying on the fact that the Oregon State Fish Commission had supplied the plans for the facilities which they were by law required to do (Tr. 775) on request of the applicant. There is no testimony on the part of anyone that the State Fish Commission's plans and specifications, as submitted, would be successful in saving the runs of salmon and steelhead were the dam constructed, or that the facilities would or could offset any of the lost upstream spawning and rearing grounds. The testimony of the engineer, Mr. William R. Farley, a member of the staff of the Federal Power Commission, is extremely significant in this respect, in view of his response to the following question by Staff Counsel:

"Q. Does this investigation involve a consideration of the efficiency and effectiveness of the fish handling facilities proposed by the applicant for the Pelton project?

A. No; but those facilities were considered to the extent that they would affect the annual cost of the project." (Tr. 615)

Again, at page 617 of the transcript he stated:

"Leaving out the consideration of the effectiveness of the fish handling facilities proposed * * *."

Why should the studies of this project leave out consideration of these facilities? The question begs the answer: The fisheries resources of the Deschutes system were absolutely disregarded by the Federal Power Commission and the Portland General Electric Company so far as possible and arbitrarily written off with only a token consideration as a mere pretense in considering the interests of the people of the State of Oregon in the destruction of valuable property rights.

ARGUMENT

Point IX.

The record fails to support this finding when there is taken into consideration the type of operation proposed by the applicant. The impoundment will be only 460 acres in extent (Tr. 160), less than a square mile, and will be subject to a severe fluctuation in level twice each day (Tr. 226, 227) which fluctuation is estimated at six feet at each of the two periods, the reason for this being that the plant will be used as a peaking plant, that is, it will be operated only at times of peak loads estimated at 4 hours per day (Tr. 160). Certainly it takes no stretch of the imagination to visualize the hazards involved in seeking recreation on a lake of 460 acres unnaturally formed in a canyon with steep walls when the lake will be subjected to such fluctuations. There is no testimony that such a lake will afford any recreation, only the hope that it would, expressed by some lay witnesses. There is no evidence in the record that the applicant will make the lake, if and when formed,

available to public use at all or at any time. It will be theirs to operate and control as they please.

The raising of the level of the water by 150 feet certainly isn't going to do a great deal to make the water more accessible to the public except possibly saving a walk of 150 feet at the point where a member of the public desires to go in.

As to the alluded to state highway under contemplation, the record fails to show that such a highway is contemplated. The record goes no further than to show that a survey was ordered — nothing more. That such a highway will be constructed is at this point nothing more than wishful thinking and it is certainly more reasonable to believe that such a road will not be constructed than that it will be constructed, in view of the steep and rocky terrain and the added fact that it will serve no industrial or agricultural purposes. That there is an old railroad bed already there does not change the picture materially, since much work and expense would be involved not only in construction but in maintenance.

In contrast to this, the testimony of Mr. Campbell (Tr. 699 through 710) indicates that there will be substantially less sports fishing available in the impoundment than in the river as it now exists. This coupled with the daily fluctuations that will occur in the impoundment certainly remove any possibility of offsetting recreational losses as a result of the loss of the stream bed.

ARGUMENT

Point X.

The record fails on its face to substantiate the finding that the applicant has complied with all applicable state laws. In fact, the record shows otherwise (Tr. 302) in that the Fish Commission has denied the applicant a permit and that the Hydroelectric Commission of Oregon had not yet granted any permit, both of which permits were required by the statutes of Oregon before any construction could begin. Added to this is the fact that no showing whatever was made that the applicant had received from any state agency the necessary permit to use any of the waters of the Deschutes River or its tributaries.

It is a well known fact that the use of the Deschutes River and its tributaries is necessary if this project is to fulfill its purpose. These streams being internal non-navigable streams of the State of Oregon, are subject to the sole jurisdiction and control of the State in its sovereign capacity. The Supreme Court of the United States, in a long line of decisions beginning at the time when the western part of our great country began to develop and expand, consistently announced and upheld the doctrine that appropriation and use of the waters of the internal non-navigable streams can only be accomplished in conformity with the constitution, laws, customs and usages of the states in which such streams are located.

Jennison vs. Kirk, 98 U.S. 453, 25 L. Ed. 240.

California Oregon Power Company vs. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725.

Atchison vs. Peterson, 20 Wall. 507, 22 L. Ed. 414.

Basey vs. Gallagher, 20 Wall. 670, 22 L. Ed. 452.

Broder vs. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790.

United States vs. Rio Grand D. & L. Company, 174 U.S. 690, 706, 19 St. Ct. 770.

Gutierrez vs. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

The United States Supreme Court in one of these decisions, California Oregon Power Company vs. Beaver Portland Cement Company, 295 U.S. 142, 79 L. Ed. 1356, has followed this doctrine and upheld the constitutionality of the Oregon Water Code.

In the more recent case of Ickes v. Fox, 300 U.S. 82, 57 S. Ct. 412, having to do with the waters of the Yakima River in our neighboring State of Washington, the United States Supreme Court again affirmed the rule that waters of internal non-navigable streams could only be appropriated and used in accordance with state laws. Under this long and impressive line of decisions handed down by our highest tribunal it is for the State of Oregon, and the State of Oregon *alone*, to determine what use is to be made of the waters of its internal, non-navigable streams. Whether this use be for irrigation, production of electric energy, or the raising of fish, is a determination entirely within the jurisdiction and control of the State of Oregon. The federal government can not directly or through any of its administrative agencies make this determination, nor can it force its

determination as to the use of the waters of internal non-navigable streams upon the states.

The determination on the part of the State of Oregon as to the use of the waters of the Deschutes River and its tributaries was obviously made when the fish Commission of Oregon refused the applicant intervenor a permit (Ex. 9). Other orders subsequent to the public hearing held by the Federal Power Commission made by administrative agencies of the State of Oregon are on file with the Clerk of this Court and unmistakably show that the State of Oregon has determined that the Deschutes River is not to be used to produce electric energy, in that the applicant has been refused the necessary permits to construct this project. These determinations on the part of the administrative agencies of the State of Oregon are conclusive evidence that the laws of the State of Oregon have not been complied with and that the State of Oregon has made its determination with respect to the uses to be made of the waters of the Deschutes River and its tributaries. This finding on the part of the Commission is not supported by any substantial evidence; in fact, it is *contrary* to the evidence.

One needs little imagination to determine the reason for such a finding; it is the foundation stone upon which the commission could establish its jurisdiction to enter its order. Its hands were otherwise tied. The evidence is so abundant, so obvious, and so conclusive, that the applicant has not complied with all applicable State laws, that it is inconceivable that such a finding could be made. We submit that this and this alone is sufficient for a court of review to strike down the commission's order.

CONCLUSION

Every finding of fact in the opinion and every finding of fact in the order of the Federal Power Commission in this matter has been challenged. Not one of the findings is supported by any substantial evidence, some are not supported by any evidence and some findings are absolutely contrary to the evidence. Amicus curiae respectfully contends that the order granting a license (major) to the Portland General Electric Company to construct the project in question is contrary to the statutes and laws of the United States and the Constitution and laws of the State of Oregon: that the findings of fact in the opinion and order of said Commission are not supported by substantial evidence: that said order is in violation of Section 9 (b) of the Federal Power Act.

Wherefore Amicus Curiae respectfully pray that said order of the Federal Power Commission be set aside.

Respectfully submitted,

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